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Defense Acquisition Regulations Council  
Attn: Ms. Amy Williams  
OUSD (AT&L) DPAP (DAR)  
IMD 3C132  
3062 Defense Pentagon  
Washington DC 20301-3062

DFARS Case 2004-D010

The University of Wisconsin-Madison is concerned about the proposal to add new export-control provisions to the Defense Federal Acquisition Regulations Supplement (DFARS Case 2004-D010) and the impact of the proposed new rules on the ability of universities to conduct research of value to the defense community. In the view of this institution, the proposed amendment to the DFARS, as published in the *Federal Register* on July 12, 2005, contains unnecessarily burdensome security provisions that exceed the requirements of the export control statutes and regulations themselves. Furthermore, the new clause is accompanied by a vague and overly broad prescription that virtually ensures its overuse by contracting officers.

Detailed comments follow.

#### I. The Prescription

The prescription for the new clause, in its current form, requires contracting officers to use it in solicitations and contracts for (a) research and development; or (b) services or supplies that may involve the use or generation of export-controlled information or technology. This runs contrary to both to law and stated policies of the executive branch of the federal government.

Fundamental university research, absent any up-front restrictions on publication, is exempt from both the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR), which the new DFARS clause purports to implement. Furthermore, it is the policy of past and present administrations (as stated in National Security Decision Directive 189) that classification, not export controls, is the proper mechanism to protect, for security purposes, information generated during federally funded fundamental research at colleges and universities. The failure of the prescription, in 204.7304(a) as drafted, to recognize the fundamental research exemption is a grave omission that will lead to misapplication of the clause to projects which the drafters of the EAR and ITAR intended to exempt from regulation – and runs counter to NSDD 189, which has been endorsed by the Bush Administration. The blanket provision for use of the new clause in research and development should be replaced, in the prescription, by an instruction to contracting officers that they must omit the clause if the project is covered by an applicable exclusion or license exemption.

Similarly, the prescription in 204.7304(b) is overbroad in requiring use of the clause in projects that *may* involve the use or generation of export-controlled information or technology. The requirements of the clause, which will be awkward and expensive – if not impossible – for universities to undertake, should not be casually applied to projects which do not clearly involve export-controlled information or technology. Instead, contracting officers should be instructed to use the clause only if the funded activity will involve export-controlled information or technology, and should further be required by the prescription to identify export-controlled aspects of the project by reference to the appropriate classification in the Munitions List or Commerce Control List, for two reasons: 1) to ensure that the new DFARS clause is not misapplied and 2) to put potential contractors and subcontractors on fair notice of the specific regulatory requirements that are being invoked by the clause.<sup>1</sup>

Finally, the prescription also errs in sub (b) by applying the new clause to the *generation* of export-controlled information or technology. Here, as in sub(a), above, the prescription as drafted fails to recognize the fundamental research exemption for basic research conducted at an educational institution. The reference to generation should be omitted or amended to incorporate the fundamental research exemption; failure to do so would put the proposed DFAR clause in conflict with the express provisions of both the EAR and the ITAR, and would create a contractual obligation not consistent with the regulations themselves.

## II. The Substance of the Contract Clause

The proposed new sec. 252.70XX of the Defense Federal Acquisition Regulations Supplement, as drafted, requires contractors to maintain an access control plan with “unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and technology.” This goes beyond the requirements of both the EAR and the ITAR and is even more onerous than the rules for managing classified material (which call for badging and segregation and other measures “as appropriate”). The proposed subpart would in effect establish a new export-control regime, enforced by contract, which is more restrictive than the rules it purports to implement, and would impose costly new administrative and financial burdens on educational institutions and small- to medium-size defense contractors without any documented need or justification.

More generally, badging and segregation of foreign scholars is contrary to fundamental academic principles of openness in research and education; forced to make a choice, universities can be expected to walk away from DOD-funded research rather than comply with the proposed rule.

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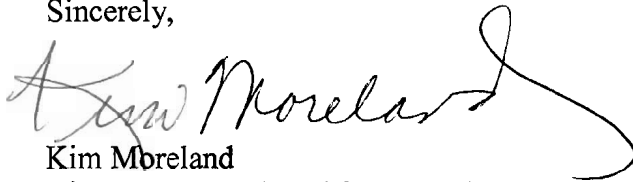
<sup>1</sup> Section 204.7301 of the proposed regulation seems to anticipate this level of specificity. It states that “the contracting officer shall ensure that contracts identify any export-controlled information and technology, as determined by the requiring activity.”

### III. Conclusion

The effect of unnecessarily restricting foreign nationals from participation in science and technology research would be severe. Foreign nationals make up a significant portion of university faculty in areas of engineering, computer science and mathematics. Indeed, almost half of the U.S. Nobel laureates in science fields since 1990 were foreign researchers. It defies common sense to needlessly remove a large and talented pool of academics from research programs that potentially enhance our national security.

Given that DFARS Subpart 204.73, as proposed, is flawed and could have profound negative consequences, the University of Wisconsin-Madison urges the Department of Defense to issue a second revised proposed rule for comment, rather than issuing a final rule with changes. Instead of requiring universities to implement extensive new security measures as a precondition for accepting DOD contracts, and subcontracts that incorporate DOD funding, simply because they *may* gain access to export-controlled information or technology, DOD should revise the proposed clause as shown in the attached or, better yet, develop an entirely new and much shorter clause that simply states that the contractor must comply with existing export laws and regulations. This would be sufficient to put universities on notice of their obligation to conform to already-extensive rules governing the actual or “deemed” export of controlled technology and information, and would more accurately reflect the intent of the applicable laws and regulations.

Sincerely,

A handwritten signature in dark ink, appearing to read "Kim Moreland", with a long, sweeping flourish extending to the right.

Kim Moreland  
Director Research and Sponsored Programs  
University of Wisconsin - Madison

Attachment: Proposed Revisions to Subpart 204.73

PART 204--ADMINISTRATIVE MATTERS

2. Subpart 204.73 is added to read as follows:

Subpart 204.73--Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities

Sec.

204.7301 Definition.

204.7302 General.

204.7303 Policy.

204.7304 Contract clause.

204.7301 Definition.

Export-controlled information and technology, as used in this subpart, is defined in the clause at 252.204-70XX.

204.7302 General.

Export control laws and regulations restrict the transfer, by any means, of certain types of information and technology. Any access to export-controlled information or technology by a foreign national or a foreign person anywhere in the world, including the United States, is considered an export to the home country of the foreign national or foreign person. For additional information relating to restrictions on export-controlled information and technology, see PGI 204.7302.

204.7303 Policy.

The contracting officer shall ensure that contracts identify any export-controlled information and technology, as determined by the requiring activity.

204.7304 Contract clause.

Use the clause at 252.204-70XX, Requirements Regarding Access to Export-Controlled Information and Technology, in solicitations and contracts for--

(a) Research and development not otherwise exempt or excepted from export control regulations; or

(b) Services or supplies that may will involve the use or generation of export-controlled information or technology which is not otherwise exempt or excepted from export control regulations.

In the event that the clause at 252.204-70XX is used, the contracting officer shall identify export-controlled aspects of the project by reference to the appropriate classification in the Munitions List or Commerce Control List.

PART 235--RESEARCH AND DEVELOPMENT CONTRACTING

235.071 [Redesignated]

3. Section 235.071 is redesignated as section 235.072
4. A new section 235.071 is added to read as follows:

235.071 Export-controlled information and technology at contractor, university, and Federally Funded Research and Development Center facilities.

For requirements relating to restrictions on export-controlled information and technology, see Subpart 204.73.

PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 252.204-70XX is added to read as follows:

252.204-70XX Requirements Regarding Access to Export-Controlled Information and Technology.

As prescribed in 204.7304, use the following clause:

Requirements Regarding Access to Export-Controlled Information and Technology (XXX 2005)

(a) Definition. Export-controlled information and technology, as used in this clause, means information and technology that may only be released to foreign nationals or foreign persons in accordance with the Export Administration Regulations (15 CFR parts 730-774) and the International Traffic in Arms Regulations (22 CFR parts 120-130), respectively.

(b) In performing this contract, the Contractor may gain access to export-controlled information or technology.

(c) The Contractor shall comply with all applicable laws and regulations regarding export-controlled information and technology, including registration in accordance with the International Traffic in Arms Regulations.

(d) The Contractor shall maintain an effective export compliance program. The program must include adequate controls over physical, visual, and electronic access to export-controlled information and technology to ensure that access by foreign firms and individuals is restricted as required by applicable Federal laws, Executive orders, and regulations.

(1) The access control plan shall include, as necessary and appropriate, unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and technology.

(2) The Contractor shall not allow access by foreign nationals or foreign persons to export-controlled information and technology without obtaining an export license, other authorization, or exemption.

(e) The Contractor shall--

(1) Conduct initial and periodic training on export compliance controls for those employees who have access to export-controlled information and technology; and

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(2) Perform periodic assessments to ensure full compliance with Federal export laws and regulations.

(f) Nothing in the terms of this contract is intended to change, supersede, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to--

(1) The Export Administration Act of 1979 (50 U.S.C. App. 2401 as extended by Executive Order 13222);

(2) The Arms Export Control Act of 1976 (22 U.S.C. 2751);

(3) The Export Administration Regulations (15 CFR parts 730-774);

(4) The International Traffic in Arms Regulations (22 CFR parts 120-130);

(5) DoD Directive 2040.2, International Transfers of Technology, Goods, Services, and Munitions; and

(6) DoD Industrial Security Regulation (DoD 5220.22-R).

(g) The Contractor shall include the substance of this clause, including this paragraph (g), in all subcontracts for--

(1) Research and development; or

(2) Services or supplies that may involve the use or generation of export-controlled information or technology.

(End of clause)

252.235-7002, 252.235-7003, 252.235-7010, and 252.235-7011 [Amended]

6. Sections 252.235-7002, 252.235-7003, 252.235-7010, and 252.235-7011 are amended in the introductory text by removing ``235.071'' and adding in its place ``235.072''.

[FR Doc. 05-13305 Filed 7-11-05; 8:45 am]